

No. 96-1768

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

C. ELVIN FELTNER, JR.,
Petitioner,
v.

COLUMBIA PICTURES TELEVISION, INC.,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether, following a district court's summary judgment determination of liability for copyright infringement, the Seventh Amendment to the United States Constitution entitles the defendant to have a jury, rather than the district court judge, exercise discretion to determine the amount of statutory copyright damages to be awarded within the ranges established by Congress in 17 U.S.C. § 504(c).

(i)

RULE 29.1 LISTING

Pursuant to Rule 29.1, Respondent Columbia Pictures Television, Inc., provides the following information:

The shares of Sony Corporation are publicly traded in the United States. Sony Corporation's subsidiaries and divisions include: Respondent Columbia Pictures Television, Inc.; Columbia Pictures Industries, Inc.; TriStar Pictures; Sony Music; CPT Holdings, Inc.; ELP Communications; Embassy Telecommunications; Embassy Television; Embassy Communications; and T.A.T. Communications Company.

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RESPONDENT'S BRIEF IN OPPOSITION

INTRODUCTION

Petitioner C. Elvin Feltner, Jr. ("Feltner") asks the Court to ignore the key facts of this case and to review and resolve an issue which would have a negligible impact on future cases and would not affect the outcome of this case. The Ninth Circuit determined in this case that the Seventh Amendment does not require that a jury (rather than the trial judge) assess the level of copyright statutory damages within Congressionally mandated ranges after liability for infringement has been established on summary judgment. That decision is consistent with this Court's copyright and Seventh Amendment jurisprudence and with the vast majority of other circuit court decisions.

The district court's factual determinations at trial in this case, moreover, were based on uncontested facts, rendering theoretical, at best, any rights to a jury trial. Other issues which were resolved by the district court were determined as a matter of law, assuming Feltner's facts to be correct. Thus, the question of whether there is a right under the Seventh Amendment to have a jury determine all factual issues on a claim for copyright statutory damage is not presented here. Respondent Columbia Pictures Television, Inc. ("Columbia"), therefore, urges the Court to deny the petition for writ of certiorari (the "Petition").

STATEMENT OF THE CASE¹

Feltner is chairman of the board and sole shareholder of Krypton International Corporation, which is the sole shareholder of Krypton Broadcasting Corporation. Feltner is also chairman of the board for the three wholly-owned subsidiaries of Krypton Broadcasting Corporation: Krypton Broadcasting of Jacksonville, Inc. (which owned and operated television station WNFT); Krypton Broadcasting of Fort Pierce, Inc. (which owned and operated television station WTVX); and Krypton Broadcasting of Birmingham, Inc. (which owned and operated television station WABM).

Krypton Broadcasting of Jacksonville, Inc., acquired station WNFT in June 1990 and assumed licenses to broadcast several Columbia television series, including "WHO'S THE BOSS?" and "SILVER SPOONS." The corporation assumed the obligation of paying the license

¹ Columbia's summary of the relevant facts is derived from its brief to the Ninth Circuit but does not include the record citations. All of these facts, however, are contained in the Second Amended Pre-Trial Conference Order and the testimony of Feltner and his employees, as reported either in the Trial Transcript or the excerpts of depositions attached to Columbia's Motion for Partial Summary Judgment.

fees for these series in monthly installments of \$20,583 ("WHO'S THE BOSS?") and \$18,394 ("SILVER SPOONS") for the right to broadcast all episodes, each of which is registered as a separate copyrighted work. For the next fifteen months, however, Feltner, WNFT, and Columbia engaged in negotiations to restructure WNFT's payment of the license fees. Despite the parties' efforts, they were unable to reach an agreement. During that time, Columbia received less than \$160,000 in license fees, while WNFT owed \$1,325,369 in license fees that were more than 30 days past due—over \$500,000 of which was more than 365 days past due.

Krypton Broadcasting of Fort Pierce, Inc., assumed existing license agreements with Columbia as part of the acquisition of WTVX in April 1991, including a license for 910 telecasts of episodes of the television series "WHO'S THE BOSS?." The license agreement required WTVX to make monthly installment payments of \$24,570. In April 1991, \$22,731.86 was currently due on the station's licenses of Columbia programming. Four months later, Columbia received a single payment of \$22,731.86, but by October 15, 1991, Columbia had not received any other payments under the license agreement. As of that date, WTVX was 150 days past due on license payments and owed Columbia \$122,850 in past due payments under the licensing agreement for "WHO'S THE BOSS?." Unlike the program licenses for WNFT, neither FELTNER nor the Krypton corporations requested a restructure of the program licenses assumed for WTVX.

Feltner and the Krypton entities did not assume any licensing agreements with Columbia in connection with the purchase of WABM by Krypton Broadcasting Corporation of Birmingham, Inc. WABM negotiated two original licensing agreements with Columbia in November 1990 to broadcast 112 episodes of the television series "HART TO HART" and 90 episodes of the series "T.J. HOOKER."

Each episode of each series is copyrighted as an individual work and Columbia holds the copyright to each such episode. WABM was required to make monthly installment payments of the \$56,000 and \$54,000 in licensing fees (respectively) due under these contracts beginning in December 1990, but WABM made only a single, partial payment of \$31,942 in August 1991. As of October 15, 1991, WABM was 150 days past due in license payments.

Although WNFT, WTVX, and WABM each were separately owned and operated by a Krypton corporation, Feltner made all policy decisions and approved and executed all contracts involving these television stations. Feltner had total responsibility for the stations' program schedule. He reviewed and authorized every broadcast on the stations, and station personnel adhered to the policy that only Feltner was authorized to make program changes.

On October 17, 1991, Columbia sent letters to Feltner and to each of the Krypton television stations terminating all existing program licenses and warning that any further broadcast of the programming would constitute copyright infringement.² Columbia's outside counsel repeated that

² Feltner asserts in his Petition (without citation), that he presented "substantial evidence" at trial that the stations "paid more than \$300,000 to Columbia, after Columbia's termination letters were sent." Petition at 21. This is incorrect. It is undisputed that no monies whatsoever were paid by Feltner between October 1991 (when Columbia terminated all licenses and declared all subsequent broadcasts to be infringements) and December 1992 (when Columbia filed its motion for summary judgment). Second Amended Pre-Trial Conference Order at 13-15. The \$250,000 paid to Columbia in 1993 (of which \$100,000 was, in fact, paid on December 24, 1992) was a nonrefundable deposit, for new consideration, under a written settlement agreement, not (as Feltner claims) payment of license fees. *Id.* at 15. See Trial Transcript at 42, 47 & 62 (Feltner was unaware of any payments between November 1991 and December 1992 other than the settlement payments made in late 1992). In addition, payments made before the October 17, 1991 termination letter totalled only \$215,600 (\$160,920 for WNFT plus \$22,738 for

warning in letters dated November 5, 1991, and December 10, 1991. Columbia initiated this action for copyright infringement and related causes of action in the District Court for the Central District of California on December 17, 1991. An amended complaint was filed on January 14, 1992.

The Krypton television stations continued to broadcast Columbia's programming, without paying any amounts due under the licensing agreements, long after suit was filed. They continued these infringing broadcasts after the district court ruled that the complaint stated a claim for copyright infringement and even after Columbia filed its motion for summary judgment on Feltner's liability as an infringer. WNFT broadcast 145 different episodes of "WHO'S THE BOSS?" a total of 411 times and 22 different episodes of "SILVER SPOONS" a total of 22 times; WTVX broadcast 149 different episodes of "WHO'S THE BOSS?" a total of 395 times; and WABM broadcast 62 different episodes of "HART TO HART" a total of 90 times and 62 different episodes of the series "T.J. HOOKER" a total of 66 times. Of the 440 series episodes that Feltner infringed, "415 of them were broadcast after the complaint in this action was filed." Petition App. at 13a.

The district court granted Columbia's motion for partial summary judgment on the issue of Feltner's liability for contributory and vicarious copyright infringement. Following a bench trial, the court found that Feltner's infringement of Columbia's 440 copyrights was willful and awarded Columbia \$20,000 per work infringed, for a total of \$8.8 million in statutory copyright damages. The Ninth Circuit affirmed the liability determination and damage award.

WTVX, and \$31,942 for WABM)—not \$300,000 as Feltner asserts. *Id.* at 14. In sharp contrast, the total amount owed as of that date was \$1,468,653 (\$1,325,369 for WNFT, \$122,850 for WTVX, and \$20,434 for WABM). *See id.* at 4-5.

REASONS THE WRIT SHOULD BE DENIED

I. THIS COURT AND A MAJORITY OF CIRCUIT COURTS HAVE CONCLUDED THAT ASSESSMENT OF STATUTORY COPYRIGHT DAMAGES IS NECESSARILY WITHIN THE DISCRETION OF THE TRIAL JUDGE.

The issue of a jury trial did not arise in this case until after the district court had granted summary judgment in favor of Columbia, having found no genuine issue of material fact and concluding as a matter of law that Feltner was liable for multiple copyright infringements. *See Petition App.* at 25a-26a. Prior to trial on the amount of statutory damages, the district court granted Columbia's motion in limine to confirm a bench trial. *Id.* at 24a. The Ninth Circuit affirmed, "agree[ing] with those cases holding that the Seventh Amendment does not provide a right to a jury trial on the issue of statutory damages because an award of such damages is equitable in nature." *Id.* at 12a. This Court and the majority of other circuit courts have reached similar conclusions. Those few courts that disagree with the majority view have ignored, misinterpreted or misapplied this Court's jurisprudence.

A. The Ninth Circuit's Decision in This Case Is Consistent With the Decisions of This Court and a Majority of Circuit Courts.

The vast majority of circuit courts to have addressed the issue, like the Ninth Circuit, have concluded that an award of statutory copyright damages is properly within the sound discretion of the trial judge and not the jury. *See Cable/Home Communication v. Network Prods., Inc.*, 902 F.2d 829, 852-53 (11th Cir. 1990); *Obolet v. Goldin*, 714 F.2d 211, 213 (2d Cir. 1983); *Twentieth Century Music Corp. v. Frith*, 645 F.2d 6, 7 (5th Cir. 1981); *Sid & Marty Krofft Television Prods., Inc. v. McDonald's Corp.*, 562 F.2d 1157, 1177-79 (9th Cir. 1977); *Chappell & Co. v. Palermo Cafe Co.*, 249 F.2d 77, 79-80 (1st Cir.

1957); *see generally* 3 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 14.04[C] (1996) (concluding these and related decisions represent the "better view").

The most thorough explanation of this conclusion was undertaken by the district court in *Raydiola Music v. Revelation Rob, Inc.*, 729 F. Supp. 369 (D. Del. 1990). The district court in that case analyzed the issue under this Court's three-part inquiry for determining whether a statutory action for damages should be considered to be legal (and thus giving rise to a Seventh Amendment right to jury trial) or equitable (with no such right): "first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Ross v. Bernhard*, 396 U.S. 531, 538 n.10 (1970). The *Raydiola Music* court found neither the pre-merger custom (the first factor) nor the abilities and limitations of the jury (the third factor) to be decisive. The court then focused on the second factor—the remedy sought.

Examining the remedy, the court analyzed the nature of statutory copyright damages and observed that such damages consistently "are considered remedial or restitutionary, remedies traditionally reserved to equity." 729 F. Supp. at 375. In addition, "the purpose of statutory damages is to remedy a wrong which would otherwise go unremedied if actual damages could not be proven," which "has long been the province of equity." *Id.* at 375-76. Finally, the statutory damage range provided in Section 504(c) "is subject to the exercise of discretion," and "[t]he exercise of discretion in fixing statutory damages is traditionally thought of as equitable." *Id.* at 376. The thoroughly equitable nature of remedy convinced that court—as well as the majority of circuit courts—that assessment of statutory copyright damages is appropriately consigned to judicial discretion, not to a jury.

These decisions are consistent with—and follow from—this Court’s characterization of the Copyright Act’s statutory damages provision as quintessentially equitable. The Court has consistently observed that statutory copyright damages necessarily are to be determined according to the exercise of judicial discretion within statutory limits:

The phraseology of the [statutory damages] section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits. . . .

. . . [T]he purpose of the act is not doubtful. The *trial judge* may allow such damages as he deems to be just [within the statutory limits].

Douglas v. Cunningham, 294 U.S. 207, 209-10 (1934) (emphasis added). Statutory copyright damages, as the Court has found, are intended to provide an equitable remedy where the legal remedy of actual damages fails to recompense the plaintiff for its injuries, and Congress has established the limits within which the trial judge—not a jury—may exercise discretion to provide justice.

The Court has further observed that the varied nature of copyright infringements requires that the trial judge be given discretion to ensure an appropriate remedy where the law has not afforded one. “The necessary flexibility to do justice in the variety of situations which copyright cases present can be achieved only by exercise of the wide *judicial* discretion within limited amounts conferred by this statute.” *F.W. Woolworth Co. v. Contemporary Arts, Inc.*, 344 U.S. 228, 232 (1952) (emphasis added).³ Although

³ The Court’s analysis in *Douglas* and *F.W. Woolworth* was based on the statutory damages provision in the 1909 Copyright Act, but neither this Court nor any circuit court has concluded that the amendments in the 1976 Act changed the nature of statutory copy-

not directly presented with the Seventh Amendment issue, the Court’s characterization of statutory copyright damages as equitable, and of remedying copyright infringement as necessitating wide judicial discretion, compels the conclusion reached by the Ninth Circuit in this case—that no right to jury trial exists for assessment of statutory damages under 17 U.S.C. § 504(c).

B. Inconsistent Decisions by Two Other Circuit Courts Are Legally and Analytically Flawed, Creating Only a Phantom Conflict.

Despite the weight of authority to the contrary, two circuit courts—the Fourth and Eighth Circuits—have concluded that the Seventh Amendment requires that a jury assess the amount of statutory damages for copyright infringement.⁴ Even a cursory review of these opinions demonstrates serious legal and analytical deficiencies. Whatever conflict is posed by these circuit courts would be better addressed on appeal of one of their decisions, not by reviewing a decision—like the Ninth Circuit’s in this case—that is consistent with the analysis and conclusions of this Court and other circuit courts.

The Fourth Circuit, in one of the earliest decisions on this issue, *Gnossos Music v. Mitken, Inc.*, 653 F.2d 117, 119-21 (4th Cir. 1981), simply ignored this Court’s analysis in *Douglas* and *F.W. Woolworth* and concluded that a suit for copyright damages, whether actual or

right damages. Feltner agrees that these provisions of the 1909 and 1976 Acts are “nearly identical” and any differences do not affect the Seventh Amendment analysis. Petition at 9 n.4.

⁴ The Seventh Circuit has concluded that assessment of statutory damages is for the trial judge but that the Seventh Amendment requires jury determination of liability and willfulness. *Video Views, Inc. v. Studio 21, Ltd.*, 925 F.2d 1010, 1014-16 (7th Cir.), cert. denied, 502 U.S. 861 (1991). The result in the instant case is consistent with Seventh Circuit’s limited view that the district court, not the jury, should assess statutory damages.

statutory, was a legal action requiring a jury trial. The *Gnossos Music* court purported to rely on the Court's decision in *Curtis v. Loether*, 415 U.S. 189 (1974), that new causes of action require a jury trial on demand if the statute creates legal rights and remedies. The Fourth Circuit, however, apparently disregarded the Court's cautionary note that "We need not, and do not, go so far as to say that any award of monetary relief must necessarily be 'legal' relief." *Id.* at 196. In light of the Court's observations in *Douglas* and *F.W. Woolworth* that copyright statutory damages are equitable and necessarily require the exercise of judicial discretion, the general holding in *Curtis* fails to support the Fourth Circuit's conclusion.⁵

The Eighth Circuit in *Cass County Music Co. v. C.H.L.R., Inc.*, 88 F.3d 635 (8th Cir. 1996), agreed with the Fourth Circuit on different, but similarly flawed, grounds. Unlike the Fourth Circuit, the Eighth Circuit addressed this Court's analysis in *Douglas* and *F.W. Woolworth* and agreed that "given that statutory damages are by definition a substitute for unproven and unprovable actual damages, statutory damages are arguably the quintessential equitable remedy, invoked when the legal remedy is inadequate. But our analysis does not end here." *Id.* at 643. Based on the observation in *F.W. Woolworth* that statutory damages are also "designed to discourage wrongful conduct," 344 U.S. at 233, the Eighth Circuit concluded that statutory copyright damages have evolved to function as a penalty; that an award of punitive damages (a penalty equivalent) traditionally is a jury matter

⁵ The Fourth Circuit's decision is further suspect to the extent that it relies on attempts to analogize copyright infringement to a common-law action for tortious interference with a property right. This Court has concluded that "characterizing the relief sought is 'more important' than finding a precisely analogous common-law cause of action in determining whether the Seventh Amendment guarantees a jury trial." *Tull v. United States*, 481 U.S. 412, 421 (1987).

(citing *Tull v. United States*, 481 U.S. 412, 422 (1987)); and therefore that statutory damages for copyright infringement are a legal remedy for the jury to determine. *Cass County Music*, 88 F.3d at 643.

This syllogism, however, demonstrates that, like the Fourth Circuit in *Gnossos Music*, the Eighth Circuit was not sufficiently attentive to this Court's decisions. The Court observed in *F.W. Woolworth* not just that statutory copyright damages are designed, in part, to discourage wrongful conduct, but that "[t]he discretion of the court is wide enough to permit a resort to statutory damages for such purposes." 344 U.S. at 233. The discretion to discourage wrongful conduct is the same discretion the court found was necessarily exercised by the trial judge. *Id.* at 232. The possibility that a trial judge may exercise discretion to discourage wrongful conduct as well as to provide restitution does not divest the judge of that discretion or magically convert what is an equitable remedy into a legal one.

Nor does characterizing statutory copyright damages, in part, as a penalty lead to a different result. Even if that remedy could be construed solely as a "penalty"—a construction that this Court's decisions preclude—the Eighth Circuit disregarded the specific holding in *Tull* that the Seventh Amendment does *not* require a jury assessment of a penalty within the statutory limits established by Congress:

The Seventh Amendment is silent on the question whether a jury must determine the remedy in a trial in which it must determine liability. The answer must depend on whether the jury must shoulder this responsibility as necessary to preserve the "substance of the common-law right of trial by jury." Is a jury role necessary for that purpose? We do not think so. "'Only those incidents which are regarded as fundamental, as inherent in and of the essence of the system of trial by jury, are placed beyond the reach of

the legislature.’’ The assessment of a civil penalty is not one of the ‘‘most fundamental elements.’’ . . .

Congress’ assignment of the determination of the amount of civil penalties to trial judges therefore does not infringe on the constitutional right to jury trial. Since Congress itself may fix the civil penalties, it may delegate that determination to trial judges. . . . We therefore hold that a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action.

Tull, 481 U.S. at 425-26 (footnote and citations omitted; emphasis added). Indeed, the Court even more broadly observed, ‘‘Nothing in the Amendment’s language suggests that the right to a jury trial extends to the remedy phase of a civil trial.’’ *Id.* at 426 n.9. Particularly in light of the Court’s recognition of the equitable nature of statutory copyright damages, this observation compels the conclusion that assessment of such damages is for the trial judge, not a jury.

The Ninth Circuit’s decision that Feltner was not entitled to a jury trial for the assessment of statutory copyright damages is consistent with this Court’s copyright and Seventh Amendment jurisprudence, as well as decisions of the majority of other circuit courts. That two other circuit courts have ignored, misinterpreted and misapplied Supreme Court precedent does not justify review of this case merely to have the Court reaffirm what it and the majority of other courts have already decided.

II. A JURY TRIAL WOULD NOT HAVE AFFECTED THE OUTCOME IN THIS CASE.

Even were the Court inclined to address whether the Seventh Amendment requires a jury assessment of statutory copyright damages at the remedy phase of trial, this case does not provide the proper vehicle for considering that issue. The facts and unchallenged legal decisions by the lower courts in this case amply demonstrate that if

Feltner had a right to jury trial, that right was theoretical at best and its exercise would not have affected the outcome.

Feltner identifies three ‘‘critical’’ factual issues that a jury allegedly needed to resolve: (1) whether Feltner’s copyright infringements were willful or innocent; (2) whether each of the television stations was a separate infringer; and (3) whether each of the episodes broadcast by Feltner’s stations constituted a single work or part of a collective work. Petition at 20. None of these issues would be properly submitted to a jury in this case. Rather, they were predominantly legal issues. To the extent any of them required a factual determination, the material facts were uncontested, entitling Columbia to judgment rendered by the district court as a matter of law.

Issue 1: Willful/Innocent Infringement

The facts demonstrate that Columbia was entitled to judgment as a matter of law on the willfulness of Feltner’s copyright infringements and that no opportunity would have existed for a jury determination of this issue. ‘‘Willful’’ within the meaning of 17 U.S.C. § 504 has been interpreted to mean ‘‘knowledge that the defendant’s conduct constituted an act of infringement.’’ *Peer Int’l Corp. v. Pausa Records, Inc.*, 909 F.2d 1332, 1335 n.3 (9th Cir. 1990), cert. denied, 498 U.S. 1109 (1991). ‘‘To refute evidence of willful infringement, [the defendant] must not only establish its good faith belief in the innocence of its conduct, it must also show it was reasonable in holding such a belief.’’ *Id.* at 1336. Columbia introduced uncontested and overwhelming evidence that Feltner knew that his conduct constituted an act of infringement and that any subjective belief to the contrary was unreasonable as a matter of law:

- Feltner knew that Columbia sent letters to him and his television stations terminating the license agreements;⁶

⁶ Trial Transcript at 39-40, 46-49, 50-53 & 139-43.

- Feltner paid no licensing fees to Columbia after he received the letter terminating the license agreements on October 17, 1991, by which time the total amount owed under the agreements was \$1,468,653;⁷
- Feltner received (1) a memorandum prepared by one of his station controllers warning that Columbia considered Feltner's continuing broadcast of formerly licensed programs to be copyright infringement; and (2) a copy of a letter from another employee to Columbia requesting that Columbia waive default of the license agreements;⁸
- Feltner knew that Columbia had filed suit against him on December 17, 1991, including multiple claims of infringement of copyrights for the programs formerly licensed by Columbia to his television stations;⁹
- Feltner knew in early 1992 that his motion to dismiss the complaint for lack of federal subject matter jurisdiction—based on Feltner's argument that only a breach of contract claim and not a copyright infringement claim was stated—was denied by the district court;¹⁰
- Feltner knew in late 1992 that Columbia had moved for summary judgment as to his liability for copyright infringement—including post-complaint infringements;¹¹
- Feltner authorized the broadcast of 94% (415 of 440) of the infringements *after* the complaint

⁷ Second Amended Pre-Trial Conference Order at 4-15. The only money Columbia received after this date was a \$250,000 nonrefundable deposit for new consideration under a written settlement agreement, not for payment of license fees. *Id.* at 15.

⁸ Trial Transcript at 42-45.

⁹ *Id.* at 55-59.

¹⁰ *Id.* at 58-59.

¹¹ *Id.* at 59.

initiating this case was filed, despite the fact that he had never heard of a program supplier taking such action against a licensee.¹²

The only evidence presented by Feltner was his own testimony that, based on his extensive experience in the industry, he believed that Columbia's express termination of the licenses was only a negotiation ploy that he was free to ignore.¹³ Such self-serving testimony is inherently incredible when proffered by the experienced chairman of a company that owns and licenses copyrighted works and who has been adjudged liable for copyright infringement. Even if arguably genuine, moreover, Feltner's professed belief was unreasonable as a matter of law. *Peer Int'l*, 909 F.2d at 1336 (declaration of copyright infringer claiming he lacked intent to infringe is insufficient to raise issue of material fact as to willfulness of infringement in light of clear revocation of license).

The district court had previously found in granting partial summary judgment in favor of Columbia as to Feltner's liability for infringement that "Columbia's termination of the license agreements on October 17, 1991 was clear and unequivocal." Petition App. at 22a. The Ninth Circuit agreed. *Id.* at 8a. The district court concluded, "This alone should have put the defendant on notice that his continued broadcast of the Columbia programs was without license, and therefore infringing." *Id.* at 22a. Moreover, the Ninth Circuit held that Feltner could not

¹² Petition App. at 22a; Trial Transcript at 40, 49, 53, 61-64, 88 & 94; Second Amended Pre-Trial Conference Order at 10-15.

¹³ See Trial Transcript at 90-91. Feltner also presented the testimony of one of his employees to the same effect, but although purportedly an expert, the employee refused to testify that it was "industry custom" (as opposed to the employee's own experience) to ignore license termination notices. The employee also had not been aware of any program supplier bringing suit for copyright infringement against a licensee until Columbia filed this action. *Id.* at 200-01.

reasonably interpret Columbia's actions as anything but a termination of the license agreements. *Id.* at 7a-9a. Feltner asserts in his Petition that he presented "substantial evidence" he "believed in good faith . . . that the licenses had not validly been terminated." Petition at 21. Feltner, however, ignores *Peer Int'l* and the district court's finding during the trial on damages that Feltner's testimony was "untenable" and did "not constitute a defense" regarding willfulness. Trial Transcript at 182-183, 191. Feltner thus failed to raise a genuine issue of material fact as to the willfulness of his copyright infringements. Had this been a jury trial, Columbia would have been entitled to a directed verdict on that issue.¹⁴

Issue 2: Television Stations as Separate Infringers

The second alleged jury issue—whether each of the television stations was a separate infringer—was not a factual issue at the damages trial but was also decided by the district court on partial summary judgment. Petition App. at 25a-34a. Feltner never offered any evidence on this issue, either in opposition to summary judgment or at the damages trial. To the contrary, Feltner steadfastly maintained throughout the proceedings that the television stations were separate legal entities over which he exerted separate

¹⁴ Feltner selectively and deceptively quotes the Ninth Circuit's opinion as finding a genuine issue of fact on this issue. Petition at 21. The court stated in full, "Feltner's arguments, *at best*, demonstrate that the facts presented to the district court were susceptible to more than one interpretation." *Id.* App. at 13a (emphasis added). The Ninth Circuit thus found that even in the light most favorable to Feltner, the record evidence supported the district court's conclusion. The court was not required to determine—and did not address—the issue of whether a genuine issue of material fact existed. Rather, the court resolved only the issue presented: whether the record evidence supported the district court's decision. Had either the district or appellate court addressed whether Feltner had even raised a genuine issue of fact as to willfulness, however, the Ninth Circuit's decision in *Peer Int'l* would have dictated a finding that Feltner's conduct was willful as a matter of law.

control. Feltner raised two legal issues which relate to the district court's conclusion that for the purpose of calculating damages, the three stations were separate infringers. See Petition App. at 14a-15a. Both issues present purely equitable or legal issues which were within the exclusive province of the district court judge.¹⁵

Issue 3: Each Episode as a Single Work

The final alleged jury issue is whether each of the episodes broadcast by Feltner's television stations constituted a single work or part of a collective work. Again, the district court resolved this issue as a matter of law based on undisputed facts. Trial Transcript at 10, 203-207. Circuit courts have unanimously held—as the Ninth Circuit concluded here—that individually produced episodes of a television series that are individually broadcast or rented to viewers are separate works for copyright purposes. *MCA Television Ltd. v. Feltner*, 89 F.3d 766, 768-70 (11th Cir. 1996), cert. denied, 117 S. Ct. 1248 (1997); *Gamma Audio & Video, Inc. v. Ean-Chea*, 11 F.3d 1106, 1116-17 (1st Cir. 1993); *Twin Peaks Prods. v. Publications Int'l*, 996 F.2d 1366, 1380-81 (2d Cir. 1993).

Feltner offered no evidence to dispute the facts that the episodes of the television series at issue in this case (1) were broadcast at random and often more than once at the option of the broadcaster, allowing viewers to watch

¹⁵ The first issue relates to the application of the doctrine of "judicial estoppel" based upon certain complaint allegations. *Id.* at 15a. Judicial estoppel "is intended to protect the integrity of the judicial process, it is an equitable doctrine invoked by the court at its discretion." *Russell v. Rolfs*, 893 F.2d 1033, 1037 (9th Cir. 1990) (quoting *Religious Technology Center v. Scott*, 869 F.2d 1306, 1311 (9th Cir. 1989) (Hall, J., dissenting)), cert. den'd, 501 U.S. 1260 (1991). The second issue relates to Feltner's argument that because he was jointly and severally liable with each of the three television stations, the stations' separate infringements should be converted into one. Both the district court and the Ninth Circuit disposed of this argument as a matter of law. Petition App. at 15a n.7. Neither issue presents any matters for a jury to determine.

as few or as many episodes as they chose without the necessity of watching all of the episodes; and (2) were individually written, produced, and registered as separate works. The extraneous facts Feltner offered to introduce into the record thus had no bearing on the district court's decision; they presented no factual dispute that could have been submitted to a jury. Feltner, moreover, challenges neither the district court's exclusion of Feltner's proffered evidence nor the Ninth Circuit's legal conclusion that such evidence was irrelevant to the resolution of this issue. Thus, the issue of whether the episodes are separate works —like the issues of whether the television stations are separate infringers and whether Feltner's conduct was willful —would not have been before a jury, is res judicata, and would not be revisited even if Feltner were entitled to a jury trial.¹⁶

Jury as Fact Finder

Finally, Feltner urges the Court to grant *certiorari* because of the importance of maintaining “the jury as a fact-finding body.” Petition at 19. Yet given the *sui generis*

¹⁶ Feltner also asserts that he “presented substantial evidence on these [three] issues,” including evidence that (a) Columbia’s programs had no value because Columbia would be “unable to re-license any of the programs in the same markets”; and (b) “the stations earned no profit from the programs.” Petition at 21. No admissible evidence was submitted on these two positions. Feltner’s evidence on the first proposition consisted exclusively of multiple hearsay and speculation. *See, e.g.*, Trial Transcript at 91, 127-128, 163, 167. In fact, Columbia believed that some of the programs could be resold in the same market. *Id.* at 160-161 and Exh. 506. With respect to the second proposition, while Feltner submitted evidence that the stations were not profitable as a whole—especially when taking into account interest on loans to purchase the stations and other overhead—the district court ruled that the testimony which extrapolated general station unprofitability to the profitability of Columbia’s programs was “unacceptable testimony”—“*hip shooting that is not permitted in federal court.*” Trial Transcript at 133. More fundamentally the district court held that both propositions were irrelevant. *See id.* at 162 & 134.

procedural history and facts presented here, the jury’s fact-finding role has not been disturbed one whit. Feltner’s liability for copyright infringement was decided via summary adjudication, as a matter of law—as was the fact that Columbia’s termination was “clear and unequivocal” and put Feltner “on notice that any continued broadcast was infringing.” Petition App. at 22a. At the bench trial on damages, the district court held as a matter of law that Feltner’s argument that termination letters and infringement lawsuits were merely collection tools which could be ignored, simply did not state a defense with respect to willfulness (and, in any event, the \$20,000 per work awarded does not require a willfulness finding).¹⁷ Moreover, the district court and the Ninth Circuit decided the issues of whether each station was a separate infringer and whether each series episode was a separate work, as questions of law, despite Feltner’s attempt to portray them as questions of fact. Thus, the question of the scope of the jury’s function, if any, which Feltner asks the Court to resolve by granting his Petition, is anything but “squarely presented” here.

Feltner’s Petition should be seen for what it is—a last ditch attempt to postpone responsibility for copyright infringement on a grand scale. It is no coincidence that the two largest awards for copyright infringement in recent history have been levied against Feltner (if the representations to that effect in his Petition are accurate). The facts in this case—and in the virtually identical *MCA*

¹⁷ Even if the district court had not found willfulness based upon undisputed facts—as it did—section 504(c) of the Copyright Act grants the district court the discretion, even absent a finding of willful or innocent infringement, to award \$20,000 for each work infringed (the amount awarded by the district court here). Because the Ninth Circuit ruled that willful/innocent infringement and the amount of damages awarded were for the court to decide, the Ninth Circuit did not address the fact that the district court’s award did not require a finding of willfulness. Feltner’s suggestion that the Ninth Circuit addressed and rejected this issue (Petition at 6 n.1) is incorrect.

Television case—more than adequately support the size of the statutory damage awards. Feltner cannot plausibly maintain any prejudice from the lack of a jury trial on these facts, particularly when he did not request a jury trial in *MCA Television*, which was tried to the court long after the district court rendered its decision here. The Court should not participate in a further delay of justice by reviewing an issue that will not affect the ultimate resolution of this case.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

Respectfully submitted,

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